

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOEL BURKETT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39400

FILED

FEB 06 2003

ORDER OF REVERSAL AND REMAND

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

This is a proper person appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus.

On November 19, 2001, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. The State opposed the petition. Pursuant to NRS 34.750 and 34.770, the district court declined to appoint counsel to represent appellant or to conduct an evidentiary hearing. On February 14, 2002, the district court denied appellant's petition. This appeal followed.¹

¹On February 13, 2002, after the district court orally denied his petition, appellant filed a motion for leave to amend his habeas corpus petition. The State opposed the motion. On March 7, 2002, the district court denied appellant's motion. To the extent that appellant appeals from the decision of the district court denying his motion for leave to amend the habeas corpus petition, this court lacks jurisdiction to consider the appeal because no statute or court rule provides for an appeal from such a motion. Castillo v. State, 106 Nev. 349, 792 P.2d 1133 (1990).

In his petition, appellant claimed that he was deprived of an opportunity for parole because he was housed in a prison outside of Nevada. Appellant claimed that his out-of-state housing made him ineligible for certification pursuant to NRS 213.1214 because he was not "under observation" by a Nevada-licensed psychiatrist or psychologist.² Appellant asserted that these circumstances violated his judgment of conviction and that he should be released from counts II and III of his judgment of conviction.

The district court denied the petition on the ground that the petition was untimely, successive and barred by laches. We conclude that the district court erred in applying the procedural bars of NRS chapter 34

²NRS 213.1214(1) provides:

The [Parole Board] shall not release on parole a prisoner convicted of an offense listed in subsection 5 unless a panel consisting of:

(a) The administrator of the division of mental health and developmental services of the department of human resources or his designee;

(b) The director of the department of corrections or his designee; and

(c) A psychologist licensed to practice in this state or a psychiatrist licensed to practice medicine in this state,

certifies that the prisoner was under observation while confined in an institution of the department of corrections and does not represent a high risk to

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to appellant's petition. Appellant did not challenge the validity of his judgment of conviction and sentence in his November 19, 2001 habeas corpus petition; rather appellant challenged the continued legality of his confinement. NRS 34.726 does not apply to a petition challenging the continued legality of a petitioner's confinement.³ The doctrine of laches is likewise inapplicable to a petition that challenges the continued legality of a petitioner's confinement.⁴ Finally, appellant's petition was not successive because the claim had not been raised or decided on the merits in a prior petition and the claim could not have been raised in appellant's prior petitions.⁵

We conclude that appellant's claim that his out-of-state housing made him ineligible for certification pursuant to NRS 213.1214 because he was not "under observation" by a Nevada-licensed psychiatrist or psychologist lacked merit. NRS 213.1214 does not preclude certification for a prisoner incarcerated outside of Nevada.⁶ Contrary to appellant's

... continued

reoffend based upon a currently accepted standard of assessment.

³NRS 34.726(1) (setting forth a procedural time bar for "a petition that challenges the validity of a judgment or sentence").

⁴See NRS 34.800(2); Boatwright v. Director, 109 Nev. 318, 322, 849 P.2d 274, 277 (1993).

⁵NRS 34.810(2), (3).

⁶NRS 213.1214; NRS 215A.020 (Interstate Corrections Compact, Article IV (d)-(f), (h)).


argument, nothing in NRS 213.1214 requires that a Nevada-licensed psychiatrist or psychologist personally observe or treat appellant; rather, a Nevada-licensed psychiatrist or psychologist is a required member of the panel making the certification decision. Despite the fact that appellant was incarcerated outside of Nevada, appellant may be “under observation while confined in an institution of the department of corrections.”⁷ However, the record does not indicate whether appellant, as a result of his incarceration outside of Nevada, received all of the rights and protections relating to certification available to a Nevada prisoner. Although appellant acknowledged that he had received a certification hearing by telephone, the record does not indicate whether appellant was denied certification based upon a lack of suitability for certification pursuant to NRS 213.1214(1) or whether he was denied certification simply because he was housed outside of Nevada and not directly under observation by a Nevada institution. Therefore, we cannot conclude that the district court properly denied appellant’s petition and we remand for further proceedings on the issue of whether appellant was denied any rights or protections relating to certification available to Nevada prisoners.


⁷See Boatwright, 109 Nev. at 321, 849 P.2d at 276 (stating that a prisoner held solely under the authority of a Nevada judgment of conviction remains in the custody of the director of the department of prisons despite the fact that the prisoner is incarcerated out-of-state pursuant to the Interstate Corrections Compact).

Having reviewed the record on appeal and for the reasons set forth above, we conclude that oral argument and briefing are unwarranted in this matter.⁸ Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.⁹


_____, C.J.
Agosti


_____, J.
Rose


_____, J.
Gibbons

cc: Hon. Michael L. Douglas, District Judge
Attorney General/Carson City
Clark County District Attorney
Joel Burkett
Clark County Clerk

⁸Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

⁹We have considered all proper person documents filed or received in this matter. We conclude that appellant is only entitled to the relief described herein. This order constitutes our final disposition of this appeal. Any subsequent appeal shall be docketed as a new matter.